Supreme Court of the United States

October Term, 1977

No. 77-258

ARNOLD R. JAGO, Superintendent,
Petitioner,

vs.

TIMOTHY PAPP,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The Respondent intimates that the decision of this Court in *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976) relegated the protections guaranteed under the Fourth Amendment of the Constitution of the United States to a position subordinate to those rights guaranteed by the Fifth and Sixth Amendments. Respondent then urges the Court not to dilute the protections afforded by the Constitution by extending the rationale of *Stone v. Powell, supra* to what he terms "core" Fifth and Sixth Amendment rights.

Respondent's argument that *Stone v. Powell, supra* not be extended to Fifth and Sixth Amendment claims is based upon the assumption that such a decision would impair the constitutional vitality of these amendments.

As this Court noted in *Stone v. Powell, supra* at 482, the exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment. The primary purpose of the rule was to act as a deterrent to law enforcement officials. It was clearly stated in *Stone v. Powell, supra* at 493 that the Supreme Court adheres to the view that the exclusionary rule should be implemented at trial and on direct appeal of State Court convictions. See also, *Stocker v. Hutto,* 547 F.2d 437 at 438 (8th Cir., 1977). The decision in *Stone v. Powell, supra* represents a recognition that there is little, if any, additional deterrent effect in allowing Fourth Amendment claims to be reviewed on collateral appeal and that the additional deterrent effect "if any" does not justify such collateral federal habeas corpus review in Fourth Amendment questions. Once the Court has reached the conclusion that there is no additional deterrent effect in allowing collateral review, there can be little justification for the costs to the criminal justice system of permitting collateral review in a Fifth and Sixth Amendment claim. It is not a constitutional right which is being denied, but rather it is the discontinuation of a procedural protection of questionable effectiveness. In *Bounds v. Smith,* 97 S. Ct. 1491 at 1502 (1977), this Court recognized that there is no broad federal constitutional right to collateral attack and whatever right exists is solely a creation of statute.

Nor could it be argued that the State Courts would be more diligent in their efforts to enforce the exclusionary rule in a Fourth Amendment context as opposed to a Fifth and Sixth Amendment context. In *Richardson v. Stone,* 421 F. Supp. 577 at 579 (N.D. California, 1976), the doctrine of *Stone v. Powell, supra* was extended to a *Miranda* claim based in part upon the fairness and competence of the State Trial and Appellate Courts.

Petitioner sees this Court's decision in *Stone v. Powell, supra* not as a dilution of the Constitution, but as a recognition of the lack of deterrence which would result from federal collateral review, and as an affirmation by the Supreme Court of the ability and willingness of the State Trial and Appellate Courts to exercise their obligation to uphold the Constitution, *Stone v. Powell, supra* at 493 n.35. This view was reinforced in *Swain v. Pressley,* 97 S. Ct. 1224 at 1231 (1977) which recognized that elected judges of the State Courts are fully competent to decide federal constitutional issues. As noted in *Munson v. Gilliam,* 543 F.2d 48 at 54 (8th Cir. 1976), the "State Courts are presumed able to protect federal rights and should be afforded the opportunity to do so. . . ." This competence surely extends to the Fifth and Sixth Amendments as well as the Fourth Amendment.

The Respondent also asserts that the State failed to provide him with a full and fair hearing. The interpretation of what constitutes a full and fair hearing ranges from the position that the Supreme Court in *Stone v. Powell, supra* did not provide any standards and left this question open for future development on a case by case basis, *Pulver v. Cunningham,* 419 F. Supp. 1221 (S.D. N.Y., 1976), to the position that *Stone v. Powell, supra* does not require the reviewing court to do more than take cognizance of the constitutional claim and render a decision in light thereof, *Moore v. Cowen,* 21 Cr. L. 2544 at 2545 (6th Cir. 1977). The Respondent plunges boldly into this fog and asserts with confidence that Respondent was denied a full and fair hearing. A review of the cases to date will demonstrate that his position is essentially without judicial support. The Respondent states that the Ohio Court of Appeals erred in holding that the State had met its heavy burden of showing a waiver of Respondent's rights. In

United States ex rel. Conroy v. Bombard, 426 F. Supp. 97 at 109, 110 (S.D. N.Y., 1976), the Court held that maintaining the lower Courts conclusion to be incorrect is not a proper objective in the context of what is a full and fair hearing. Rather the Court suggests that it is the "process" i.e. whether his claims were presented and whether the conduct of the hearing judge circumvented these procedures are what must be attacked to demonstrate the lack of a full and fair hearing, *United States ex rel. Conroy v. Bombard, supra.* In *Holmberg v. Parralt,* 548 F.2d 745 at 746 (8th Cir. 1977), it was held that the erroneous application of Fourth Amendment principles is not relevant as to whether the Federal Court may review the merit of the claim.

In the instant case, there was a full suppression hearing (See Supplemental Appendix A at SA1), a full review by the State Appellate Court (See Appendix B at A7), and an appeal was made to the State Supreme Court (See Appendix C at A16). There was ample opportunity for the Respondent to raise his constitutional claims. As the Eighth Circuit Court of Appeals noted in *Hines v. Auger,* 550 F.2d 1094 at 1097 (8th Cir. 1977), "The emphasis of *Stone* is on the *opportunity* for full and fair litigation, not upon the fullness or fairness of the litigation." Even had the Respondent not raised his constitutional claim on appeal, it has been held the mere opportunity to do so would be sufficient to establish a full and fair hearing under *Stone v. Powell, supra,* see *Tisnado v. United States,* 547 F.2d 452 at 455 (9th Cir. 1976), nor is there a requirement that there be a Petition for Certiorari to the State Supreme Court to assure a full and fair hearing, *Holmberg v. Parratt, supra* at 747.

Respondent contends that the Petitioner's Statement of facts are . . . "in clear contradiction of what is revealed

by the tapes" (Respondent's Brief, at 15), and that Respondent has . . . "demonstrated that the facts are in dispute . . ." (Respondent's Brief at 18). Counsel for respondent cites his own conclusion offered to the District Court as fact. He states "The context clearly indicates he was *not* referring to a rape-murder" (R.T., page 71; Respondent's Brief, page 5). Respondent then accuses the State of "clear contradiction" when the State refuses to accept Respondent's conclusions as fact. The transcript of the suppression hearing, as well as the record before the State Court of Appeals, demonstrates that the facts were fully aired and the State Court's decisions were based upon the facts. Even in cases where the State decision was not supported by the record, the Federal Courts have been reluctant to find that there was not a full and fair hearing, see *Dents v. Commissioner of Correctional Services,* 421 F. Supp. 557 at 559 (S.D. N.Y., 1976). In the instant case, the record could not have been more complete including actual tape recordings of the questioned interrogation. In so far as the issue of a *Stone v. Powell, supra* full and fair hearing, the question is whether a true statement of the facts was before the State Court when they rendered their decisions. The fact that in the Petitioner's and Respondent's briefs, the State's interpretation of the facts as an advocate of the State is different from the Respondent's interpretation of the facts as an advocate for the Respondent is of no significance if, in fact, it is undisputed that a full record was before the State Courts.

It would appear that under the bulk of decisions to date interpreting *Stone v. Powell, supra* that the Respondent, having had the opportunity of a full review by two tiers of the State system and the submission of this question to the State Supreme Court has not been denied a full and fair hearing, see *Chavez v. Rodriguez,* 540

F.2d 500 at 502 (10th Cir., 1976); *George v. Blockwell,* 537 F.2d 833 at 834 (5th Cir. 1976); *United States ex rel. Placek v. State of Illinois,* 546 F.2d 1298 at 1300 (7th Cir. 1976); *Riguba v. Parkinson,* 545 F.2d 56 at 57 (8th Cir., 1976).

CONCLUSION

Petitioner urges that this case is a highly appropriate vehicle for determining the important question raised in the Writ of Certiorari. This Court, having rendered its decision in *Stone v. Powell, supra,* has placed upon the State Court the burden of responsibility in upholding our constitution in Fourth Amendment situations. Now to suggest that State Courts, although equal to the task of deciding Fourth Amendment issues, are unable to fairly determine Fifth and Sixth Amendment issues without the opportunity for federal review would denigrate the Fourth Amendment to an inferior status. Such a decision would also be a contradiction of the trust placed in the state judiciary by the Supreme Court, which has in *Stone v. Powell, supra,* recognized the capability and integrity of our State Courts and perhaps more significantly provided a cornerstone to all State Courts for increased self-reliance and responsibility for preserving our Constitution.

Although the State Courts have clearly been given increased responsibility in so far as upholding the Constitution, little guidance has been offered as to what is in fact an opportunity for a "full and fair hearing." To date a plethora of lower Federal Court decisions have not arrived at clear-cut guidelines to aid the State Courts in resolving this question. Such guidelines are not only desirable, but necessary in order for this Court to assure the uniform application of criminal justice across the land.

The Respondent has raised many constitutional claims regarding his conviction for the murder of Roxie Ann Keathley. It is not disputed that these issues were presented for the State Court for its determination.[1] This case, with its important constitutional issues presents the ideal vehicle for determining what is, in fact, an opportunity for a full and fair hearing and for developing touchstones for the State Courts and the Federal Courts in determining if an opportunity was presented for a full and fair hearing.

The Petitioner would further urge that the Petitioner's Petition for Writ of Certiorari be granted and an order entered in accordance with Petitioner's Writ of Certiorari.

Respectfully submitted,

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[1] The question of the innocence of the Respondent is not truly before the Court as the Honorable Timothy S. Hogan noted "I don't think anybody has the slightest doubt that this fellow killed her, but that's not the question this Court has." (Remand Hearing Transcript, United States District Court For the Southern District of Ohio, Western Division, Tr. 76).

SUPPLEMENTAL APPENDIX A

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed October 15, 1973)

Case No. 16862

COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

STATE OF OHIO
Plaintiff

vs.

TIMOTHY PAPP
Defendant

Motion of defendant, Timothy Papp, to suppress any statements made by said defendant to the Lorain County Sheriff's Department on March 23, 1973, and to suppress any evidence obtained thereafter heard, considered and overruled. Exceptions. The court finds that said statements and evidence are admissible under *Miranda v. Arizona,* 386 U.S. 436, and *State vs. Jones,* 35 O.A.2d, 92, and the totality of said investigation and interrogation. The court further finds that the defendant's right to counsel provided for in O.R.C. 2935.20 has not been violated and that such right to counsel have been waived and such statements and evidence obtained without counsel were voluntarily given and are admissible for the consideration of the jury pursuant to further instruction of the court.

/s/ PAUL J. MIKUS
Judge